Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1998

BRANCHBURG PLAZA ASSOCIATES, L.P.,

Petitioner,

vs.

WILLIAM FESQ,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Third Circuit's dissenting opinion correct that the bankruptcy debtor's fraud is not the one and only basis to vacate a Chapter 13 order of confirmation, and that the other grounds set forth in Bankruptcy Rule 9024 are also available to interested parties and the courts in accordance with the plain meaning of Bankruptcy Code Section 1330.

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Petitioner, Branchburg Plaza Associates, L.P. ("Branchburg" or "Petitioner"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit dated September 25, 1998 in *In re Fesq*, Case No. 97-5140 is not published (App. G). The opinion of the United States Court of Appeals for the Third Circuit dated August 18, 1998 is reported at *In re Fesq*, 153 F.3d 113 (3rd Cir. 1998) (App. A). The opinion of the District Court dated March 11, 1997 in *In re Fesq*, Civ. No. 96-5555 is not published (App. B). The opinion of the Bankruptcy Court dated October 24, 1996 in *In re Fesq*, Case No. 96-31679 is not published (App. E). The opinion of the Bankruptcy Court dated March 4, 1996 in *In re Fesq*, Case No. 95-34978 is not published (App. F).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit ("Court of Appeals") was entered on August 18, 1998. The Court of Appeals denied a timely petition for rehearing en banc on September 25, 1998 (App. A, G).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Code Chapter 11 Section 1330 provides in part as follows:

> (a) On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

United States Code Chapter 11 Section 1144 provides in part as follows:

> On request of a party in interest at any time before 180 days after the date of entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such order was procured by fraud.

Bankruptcy Rule 9024 provides in part as follows:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by §1144, §1230 or §1330.

Federal Rule of Civil Procedure 60(b) provides in part as follows:

> the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect, . . . (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The fundamental question is whether Congress intended fraud by the debtor as the one and only basis to vacate an order

confirming a Chapter 13 bankruptcy plan. Such a rule would be draconian since it would not allow the courts to do justice in cases where human frailties prevented a creditor from presenting its side of the case to the court, or even where the court did not provide notice of the hearing to the creditor. For instance, if a death or natural disaster prevented an appearance at the confirmation hearing, or the creditor simply did not receive notice from the court of the hearing date, the court would lack the necessary information to deny confirmation, and upon learning the necessary information would be unable to vacate the confirmation order.

In the case of Chapter 11 bankruptcies, Congress clearly chose this draconian result. 11 U.S.C. § 1144. Since there was no similar language inserted by Congress in the Chapter 13 statute, such a draconian provision should not have been implied by the Court of Appeals. 11 U.S.C. § 1330.

The procedural background of this tortured case is briefly set forth below.

A. The State Court Proceedings

On April 16, 1993, judgment was recovered by Branchburg against William Fesq (the "Debtor") in an action before the Superior Court of New Jersey, Law Division in the amount of $69,166.59 (the "Judgment"). On December 17, 1993, to enforce the Judgment, a writ of execution was issued against the Debtor's residence at 538 Cokesbury Road, Califon, New Jersey (the "Property").

B. The Chapter 7 Bankruptcy

In 1995, the Debtor filed a Chapter 7 proceeding, Case No. 95-34978 (the "Chapter 7"). After the Chapter 7 proceeding

was closed, Branchburg sought to foreclose its lien against the Property.

At the Bankruptcy Court hearing on March 4, 1996, on the Debtor's motion to stay Branchburg's foreclosure sale, the Debtor's counsel stated on the record that if the Debtor did not prevail at that hearing, he would file a Chapter 13 proceeding.

At the conclusion of that hearing, the court determined that Branchburg's lien survived the Chapter 7, that the costs of sale or transfer, including but not limited to capital gains taxes, may not be deducted in determining the amount of Branchburg's lien, and the issue of the valuation of the Property would have to be resolved, if at all, in a Chapter 13, when and if a Chapter 13 were filed.

C. The Chapter 13 Bankruptcy

Two days later, on March 6, 1996, the Debtor did in fact file this Chapter 13 proceeding (this "Chapter 13"). Counsel for Branchburg, Friedman Siegelbaum, filed a notice of appearance in this Chapter 13 on March 21, 1996. Friedman Siegelbaum did not attend the Section 341(a) first meeting of creditors, or take a Rule 2004 examination, because the Debtor's allegation of the amount of Branchburg's claim was identical in the Chapter 7 and this Chapter 13.

The initial notice of this Chapter 13 set forth the last day for objections to confirmation of the Debtor's plan as August 5, 1996. However, due to a computer glitch, the date was diaried as October 5, 1996. The computer system, which had been recently installed, would insert appointments in months other than the month intended. When this problem was ultimately discovered, most, but not all, of the misdiaried dates were reinputted.

Therefore, no objection was filed on August 5, 1996, and the Debtor's plan was confirmed on August 15, 1996.

The plan provides for a single lump sum payment to Branchburg as the entire plan — no other creditors' claims are addressed in any way. The plan calculates the lump sum by deducting costs of sale, including but not limited to capital gains taxes, in direct contradiction of the Court's findings in the Chapter 7.

No notice was received by Friedman Siegelbaum of the confirmation of the Debtor's plan until August 30, 1996, more than 10 days after the entry of the confirmation order, thereby precluding the filing of an appeal. The notice was in the form of a motion to void Branchburg's lien upon payment of the lump sum under the Debtor's plan.

On the next business day, September 3, 1996, Branchburg cross-moved to vacate the order of confirmation due to mistake, inadvertence, excusable neglect or inexcusable neglect.

On October 24, 1996, the Bankruptcy Court heard oral argument on the Debtor's motion and Branchburg's cross-motion. Branchburg introduced evidence that its claim should be $78,000, not the $7,050 provided for in Debtor's plan.

In granting the Debtor's motion to void Branchburg's lien following payment under the Debtor's plan, and in denying Branchburg's cross-motion to vacate the confirmation order, the Bankruptcy Court believed itself bound by *In re Szostek*, 886 F.2d 1405 (3rd Cir. 1989), even though that case did not discuss the applicability of Bankruptcy Rule ("B.R.") 9024 and Federal Rules of Civil Procedure ("FRCP") 60(b). App. E at 41a. However, the Court stated at App. E at p. 42a as follows:

> We all make mistakes, Mr. Berger, and I'm not happy imposing the consequences that are going to flow here . . .

D. The District Court Opinion

Branchburg duly filed a Notice of Appeal to the District Court. However, the District Court also believed itself bound by *In re Szostek*, *supra*, and affirmed the Bankruptcy Court's ruling App. B at 31a-32a.

E. The Circuit Court of Appeals — Majority Opinion

Branchburg duly filed a Notice of Appeal to the Third Circuit. The Third Circuit declined to overrule the lower court decisions. However, Circuit Judge Stapleton dissented in a strongly worded and well written decision.

The majority recognized that the issue in this case one of law and not of fact, and that therefore plenary review is the proper standard. App. A at 4a.

The majority then focused on Section 1330 of the Bankruptcy Code which provides in part "at any time within 180 days after the date of the entry . . . , the court may revoke such order if such order was procured by fraud." The majority read this phrase to mean that a Chapter 13 confirmation order may only be revoked if procured by fraud. App. A at 5a-6a.

The majority then examined Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60(b), which permit orders to be vacated for excusable neglect and other grounds. The majority held that allowing for grounds other than fraud would improperly permit such rules to trump or enlarge Section 1330. The majority reasoned that Section 1330 would not refer to

"fraud" if Congress intended to permit other grounds for relief. App. A at 6a-10a.

The majority then sought to explain away the "if and only if" fraud language in Bankruptcy Code Section 1144, which is noticeably different from the "if" language in Section 1330. The majority found no basis for any distinction between Chapter 11 and 13, and assumed that the difference arose from a mistake by Congress. App. A at 10a-13a.

Finally, the majority cited to case law regarding the finality of confirmation orders and the need to show fraud, without any indication whether each of the cited courts considered the interaction with Bankruptcy Rule 9024. App. A at 13a-17a.

F. The Circuit Court of Appeals — Dissenting Opinion

Circuit Judge Stapleton presented persuasively Petitioner's position that fraud is not, and a should not be, the sole ground to vacate a Chapter 13 confirmation order. App. A at 18a-26a.

While recognizing the need for finality in judgments, Judge Stapleton noted that "mistakes are made and justice miscarries." Every jurisdiction provides a safety valve. In the federal bankruptcy courts, that safety valve is Bankruptcy Rule 9024, which refers to Federal Rule of Civil Procedure 60(b). Rule 9024 specifically refers to the 180 day period set forth in Section 1330, and makes that time period applicable to any grounds for relief from a Chapter 13 confirmation order. App. A at 18a.

Section 1330(a) places a 180 day limit on motions to vacate Chapter 13 confirmation orders on the grounds of fraud, but does not limit the grounds for seeking to vacate such orders. By contrast, Section 1144 permits a court to vacate a confirmation order "if and only if" fraud is shown. Rather than

assuming a mistake by Congress, Congress, it is "more prudent to take Congress at its word. There are any number of reasons Congress may have regarded it advisable to provide somewhat different finality . . ." App. A at 18a-20a.

While courts clearly would be empowered to vacate fraudulently obtained confirmation orders in the absence of Section 1330, Section 1330 requires relief to be sought within 180 days of entry of the confirmation order. Rule 9024 applies the same time period limitation to the other grounds for relief set forth in Federal Rule 60(b). App. A at 19a-20a.

The opinion in *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989) addresses a completely different issue. In that case the court held that failure by the bankruptcy court, debtor and trustee to assure that a plan complies with Section 1325 does not constitute fraud. Therefore, failure to comply with Section 1325 is not a basis to vacate pursuant to Section 1330(a). That case did not consider the alternate grounds set forth in Bankruptcy Rule 9024. App. A at 21a-23a.

The other cases cited by the majority are likewise inapposite. App. A at 23a. However, the decision in *In re Cisneros*, 994 F.2d 1462 (9th Cir. 1993) supports the dissent. In that case, the court considered Section 1328 which permits a vacating a Chapter 13 discharge order "only if" there is a showing of fraud. The Ninth Circuit found that Rules 9024 and 60(b) permit revocation for grounds other than fraud. App. A at 23a-25a.

The Third Circuit dissent in this case summed up as follows:

> Why should we, in the absence of an unambiguous directive of Congress, tie the hands of bankruptcy judges in situations where justice cries out for

> review of a previously entered judgment. Why, for example, should we render a bankruptcy court powerless to grant relief when an objecting creditor's attorney has a heart attack on his way to a confirmation hearing at which a final order is entered? Moreover, not only would such a holding fail to serve justice, little if anything, would be gained from it in the way of finality. Under the Court's reading of the Code and the Rules, litigants cannot count on finality of a confirmation order until 180 days after the order is entered. Up until that time, a claim of fraud can be asserted and litigated. While my reading of the Code and Rules would permit claims of a limited variety, other than fraud, to be filed during that period, it would not extend the date upon which a confirmation order becomes unchallengeable.

App. A at 25a-26a.

Thus, the majority improperly read Section 1330 to limit remedies rather than setting a time period, and read in a draconian result rather than "taking Congress at its word." App. A at 19a-20a.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT'S INTERVENTION IS NEEDED TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS AS TO WHETHER CODE SECTION 1330, BR 9024 AND FRCP 60(b) MAKE FRAUD THE EXCLUSIVE BASIS FOR RELIEF FROM A CHAPTER 13 CONFIRMATION ORDER.

This case presents an issue not only of exceptional importance, but also of first impression for this Court. If the opinion below is allowed to stand, justice will be ignored for no explicable reason. Simply put, the Court of Appeals inserted a draconian clause into Section 1330 that does not exist. Moreover, the very existence of Judge Stapleton's well reasoned dissenting opinion should form a basis for this Court to consider whether the Court of Appeals arrived at the correct decision.

Section 1330 of the Bankruptcy Code permits a court to vacate an order of confirmation based upon a showing of fraud within 180 days of the entry of the order. Bankruptcy Rule 9024 applies the same 180 day limitation to the other grounds for relief from a confirmation order set forth in Federal Rule of Civil Procedure 60(b). Since this Court promulgates the bankruptcy rules, it is clearly this Court's interpretation that Section 1330 is a limitation on time, and not a limitation on grounds for relief.

Human frailties and mistakes, excusable or inexcusable, is an inextricable part of the litigation process. Even machines "make" mistakes due to the frailties of their hardware producers, programmers or those who input information. This case involves just such a computer glitch.

There are numerous reasons other than the fraud of the debtor which would justify the vacating of any order, including an order of confirmation. The heart attack of the creditor's attorney while on the way to the confirmation hearing, suggested by Judge Stapleton, is but one of innumerable examples where justice would not be served by limiting the grounds for vacating an order of confirmation to solely fraud. App. A at 25a.

As set forth in Judge Stapleton's opinion, there is no basis to differentiate confirmation orders from other orders or judgments. Since a confirmation order can not become final for 180 days anyway pursuant to Section 1330, there is no reason to preclude a creditor from raising other grounds for relief during that 180 day period. App. A at 25a-26a. Section 1144 limits the grounds for relief from a Chapter 11 confirmation order to fraud. By contrast, Section 1330 does not limit the grounds to fraud but rather sets a time limit to raise fraud. "[I]t is more prudent to take Congress at its word" than to read in a draconian clause that simply does not exist. App. A at 19a-20a.

Finally, *In re Cisneros*, *supra* demonstrates that there is a division between the Third Circuit and the Ninth Circuit as to the meaning and applicability of Bankruptcy Rule 9024. Only this Court can resolve that conflict and provide for uniform treatment throughout this Country.

II.

THIS COURT'S INTERVENTION IS NEEDED TO GRANT PETITIONER RELIEF FROM THE CONFIRMATION ORDER IN THIS MATTER PURSUANT TO BR 9024.

The computer glitch in this case, and the immediate action taken to overturn the order, constitutes grounds for relief pursuant to Bankruptcy Rule 9024.

In our computer age, where machines are relied upon by litigator's for scheduling, errors caused by computer glitches are increasingly common. The Bankruptcy Court in this case was "not happy imposing the consequences that are going to flow here", but felt bound by *Szostek*, *supra*. App. E at 42a. The Bankruptcy Court should not have felt precluded from doing justice.

Generally, courts have discretion in granting FRCP 60(b) motions, and should be guided by serving the interests of justice. *Ross v. Meagan*, 638 F.2d 646, 648-9 (3rd Cir. 1981); *Shapiro v. Baker*, 646 F. Supp. 127 (D. N.J. 1985). When there is a meritorious defense a default should be vacated to permit a trial on the merits. *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242 (3rd Cir. 1951); *Compton v. Alton Steamship Co.*, 608 F.2d 96 (4th Cir. 1979). Pursuant to FRCP 60(b)(6), relief may be granted even if the neglect is inexcusable. *Boughner v. Secretary of H.E.W.*, 572 F.2d 976 (3rd Cir. 1978); *Jackson v. Washington*, 569 F.2d 199 (D.C. Cir. 1977).

This Court in *Pioneer Investment Services v. Brunswick Associates Limited Partnership*, 113 S. Ct. 1489 (1993) laid out a five part standard for when an order should be vacated for excusable neglect:

1. Whether granting the delay will prejudice the debtor;

2. The length of the delay and its effect on efficient court administration;

3. Whether the reason for the delay was within the control of the movant;

4. Whether the movant acted in good faith; and

5. Whether the movant should be penalized for its counsel's mistake.

In analyzing the *Pioneer* decision, the Court in *In re Beltrami Enterprises, Inc.*, 178 Bankr. 389 (Bankr. M.D. Pa. 1994) stated as follows:

> While it is true that the Black's Law Dictionary definition of excusable neglect does not apply when client or counsel is inattentive, the *Pioneer Court* specifically rejected that definition in favor of a balancing test that would weigh the various factors enunciated . . . [above.]

Id. at 392. There are two standards of review: a liberal standard when a matter has not been considered on the merits; and a strict standard when the matter has been adjudicated on the merits. *Id.* at 393. There has not been an adjudication on the merits in this Chapter 13, so the liberal standard applies.[1]

In the case at bar, the only factor mitigating against relief is that the delay was within the reasonable control of counsel. All other factors favor vacating the confirmation order.

First, the Debtor would not be unfairly prejudiced by vacating the confirmation order since he would be in the same position that he was in prior to the entry of the confirmation order. Other than $595 of attorney's fees for attendance at the confirmation hearing, the Debtor did not introduce any evidence that he had changed his position in any way during the four (4) days between the date that the confirmation order became final and the date that Branchburg filed its cross-motion to vacate the default. Moreover, there are no other claims which would come back into existence if the confirmation order is vacated, since Branchburg's claim is the one and only claim dealt with in the Debtor's plan.

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1. There was an adjudication on the merits regarding the capital gains issue in the Debtor's prior Chapter 7; *Branchburg prevailed on the merits.* App. F at 44a-45a.

Second the length of the delay was only four (4) days after the confirmation order became final. Branchburg's counsel filed its cross-motion the next business day after it received notice of the entry of the confirmation order. Third, the reason for the delay was an error in diarying the date resulting from a computer glitch. There was no bad faith or maliciousness.

Finally, it would be unjust to penalize Branchburg for the sins of its counsel. As demonstrated to the Bankruptcy Court, Branchburg has a secured claim for $78,000, for which the Debtor proposed to pay only $7,050. The Bankruptcy Court had determined in the prior Chapter 7 proceeding that costs of sale, including capital gains, could not be deducted in determining the amount of a secured claim citing to *In re Abrahimzadeh*, 162 Bankr. 676 (Bankr. D. N.J. 1994). App. F at 45a. The Debtor acted in direct contravention of this finding when he calculated Branchburg's claim for purposes of his Chapter 13 plan. The Debtor proposed to retain the Property, but deducted costs of sale and capital gains taxes as if he were transferring the Property to Branchburg.

Thus, out of the five factors, only one factor mitigated against granting the cross-motion. Since this is a five factor balancing test, rather than a one factor test, merely because one factor is not met should not have formed the basis to deny relief pursuant to FRCP 60(b). *In re Beltrami Enterprises, Inc.* 178 Bankr. 389 (Bankr. M.D. Pa. 1994) (FRCP 60(b) relief granted even though movant missed filing deadline due to lack of vigilance); *Wolfson v. Raab*, 11 FRD 254 (E.D. Pa. 1951) (FRCP 60(b) motion granted when movant's attorney miscalculated date answer due resulting in default).

A windfall should not be given to this and future debtors to escape 90% or more of their liabilities merely because of excusable neglect or other grounds set forth in Bankruptcy Rule 9024.

CONCLUSION

This case raises an issue of exceptional importance — whether the grounds set forth in Bankruptcy Rule 9024 are sufficient to vacate a Chapter 13 Order, or whether a creditor must show fraud. A fraud limitation would improperly prevent bankruptcy courts from reconsidering confirmation orders on the merits of Bankruptcy Rule 9024. The Court of Appeals read in a requirement that does not appear in the plain language of Section 1330, and is contrary to this Court's interpretation in enacting Bankruptcy Rule 9024. In addition, the Court of Appeals decision in this case is in conflict with the *In re Cisneros* decision by the Ninth Circuit. Thus, this Court's intervention is necessary to permit the bankruptcy courts to dispense justice, to restore the plain meaning of Section 1330, and to resolve a conflict among the Circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 97-5140

IN RE: WILLIAM FESQ,

Debtor

BRANCHBURG PLAZA ASSOCIATES, L.P.,

Appellant

v.

WILLIAM FESQ

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil Action No. 96-cv-05555)

Argued March 10, 1998

BEFORE: STAPLETON and ALITO, *Circuit Judges*,
and SHADUR,* *District Judge*

(Opinion Filed August 18, 1998)

* * *

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* Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Appendix A

OPINION OF THE COURT

SHADUR, Senior District Judge:

This is an appeal by Branchburg Plaza Associates, L.P. ("Branchburg"), a creditor of bankrupt debtor William Fesq ("Fesq"). Branchburg claims that both the bankruptcy court and then the district court erred in denying Branchburg's motion to vacate the bankruptcy court's earlier order confirming Fesq's Chapter 13 plan. We have jurisdiction over the appeal under 28 U.S.C. §158(d), and we affirm the district court's decision.

Background

This long-running dispute between Branchburg and Fesq goes back to April 16, 1993, when Branchburg recovered a $69,166.59 judgment against Fesq in New Jersey Superior Court. On December 17, 1993 Branchburg obtained a writ of execution against Fesq's house to enforce that judgment.

Fesq then avoided a foreclosure sale of the house by filing a Chapter 7 petition on July 14, 1995. That respite proved short-lived, however, for Branchburg's lien on the real property survived the Chapter 7 proceeding. Branchburg again sought to foreclose on its lien shortly after the Chapter 7 proceeding closed.

Branchburg's persistence led Fesq to file a Chapter 13 proceeding on March 6, 1996[1] that addressed only Branchburg's lien on the house. Fesq's proposed plan provided for a single

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1. All of the remaining dates referred to here were also during 1996, so we omit the year designations from here on out.

lump-sum payment of $7,050 in full satisfaction of Branchburg's secured claim. Branchburg's attorney Friedman Siegelbaum ("Siegelbaum") filed a notice of appearance in the Chapter 13 case, but he then failed to attend the Section 341(a) first meeting of creditors or to schedule a Rule 2004 examination of Fesq.[2] More importantly, Siegelbaum did not file any objections to Fesq's proposed plan by the August 5 deadline date for such objections. There were consequently no objections to Fesq's proposal, and an order of confirmation was entered on August 15.

Fesq filed a motion to vacate Branchburg's lien immediately upon entry of the confirmation order. On August 30 Branchburg filed a cross-motion to vacate the confirmation order, asserting that its failure to make a timely objection was the result of a computer glitch at Siegelbaum's firm, which had led him to believe that the deadline for the filing of objections to the proposed plan would not arrive until October 5, rather than the actual August 5 date.[3] Branchburg argued that it would have objected to several substantive aspects of Fesq's plan but for the computer error.

On October 28 the bankruptcy court's oral ruling granted Fesq's motion and denied Branchburg's cross-motion. That

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2. All "Section —" references in this opinion are to the Title 11 provisions of the Bankruptcy Code ("Code"). Both the Bankruptcy Rules and the Federal Rules of Civil Procedure are cited "Rule —," a usage that should not generate any confusion because the former set uses four-digit numbers, while the latter employs two-digit numbers.

3. Branchburg claims that it could not appeal the confirmation order because the 10-day period for filing an appeal had passed before it realized that the confirmation order had been entered.

ruling was affirmed on appeal by the district court in an unpublished memorandum opinion. Branchburg then brought a timely appeal to this Court.

Standard of Review

This appeal raises only a question of law, not one of fact. We therefore exercise plenary review over the decision of the district court (*In re Fegeley*, 118 F.3d 979, 982 (3d Cir. 1997)).

Revocation of the Confirmation Order

Branchburg's appeal poses the fundamental question whether a final order confirming a debtor's Chapter 13 plan can be vacated without a showing of fraud, an issue that the parties have contested in terms of what grounds are available under law for revocation of such confirmation orders. While fraud is the only predicate that is specifically mentioned in the Code for the revocation of a confirmation order, Branchburg insists that courts may also revoke such orders that have been the consequence of mistake, inadvertence or excusable neglect. This appeal hinges on that point, because Branchburg admits that its failure to object to the confirmation order was the result of a combination of human and computer error, not fraud. So if Branchburg is wrong and if fraud is indeed the only basis upon which we may revoke a Chapter 13 confirmation order, we must affirm the district court irrespective of the potential merit of Branchburg's substantive allegations.

Our analysis must begin with the language of Section 1330(a), the Code provision that deals with the revocation of a Chapter 13 confirmation order:

Appendix A

> On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

It is of course conventional wisdom that the statute should be read to give some effect to the final phrase "if such order was procured by fraud," for as a general rule of statutory construction "[w]e strive to avoid a result that would render statutory language superfluous, meaningless, or irrelevant" (*Cushman v. Trans Union Corp.*, 115 F.3d 220, 225 (3d Cir. 1997)). And here it is particularly unlikely that the final phrase is mere surplusage, because it would have been so easy not to include the phrase if it were really superfluous. Simply excising the phrase from the statute would have left a perfectly sensible sentence that would accomplish every purpose of the current statute — except, that is, for limiting the grounds for relief, the subject that we address hereafter.

Ordinary English usage tells us that Section 1330(a) is subject to only two interpretations if we are to avoid rendering meaningless the qualification "if such order was procured by fraud." First, the section can be read to say that a confirmation order can be revoked only upon a showing of fraud, and to set a 180-day time frame within which a motion for such relief may be tendered. Second, the section can be read as only prescribing a 180-day time limit on motions to revoke orders that were procured by fraud, without speaking at all to the subject of other potential grounds for revocation. For the reasons discussed in this opinion, we conclude that the first construction is the more reasonable interpretation of Congress' intent.

Nonetheless Branchburg insists that the second interpretation should be favored and that Section 1330(a) should be read to permit judicial revocation of confirmation orders for reasons other than fraud. Branchburg advances that contention by pointing to Rule 9024, which makes Rule 60(b) generally applicable to bankruptcy cases. In relevant part Rule 60(b), in contrast to Section 1330(a), allows for relief from final orders in the generic sense on a number of bases:

> [T]he court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment.

Branchburg argues (1) that its counsel's computer mishap qualifies as "mistake, inadvertence . . . or excusable neglect" under Rule 60(b) and (2) that because Rule 9024 makes Rule 60(b) generally applicable in bankruptcy, the revocation of Fesq's Chapter 13 confirmation order is called for. That position requires an examination of the relationship between Section 1330(a) and Rule 9024 to see whether Branchburg can properly take advantage of Rule 60(b)'s more expansive grounds for relief.

Branchburg wisely does not attempt to argue that Rule 9024 simply trumps Section 1330(a), for when Congress accorded the Supreme Court authority to promulgate the Bankruptcy Rules, it stated "[s]uch rules shall not abridge, enlarge, or modify any substantive right" (28 U.S.C. §2075). Thus, "[a]s a

general matter, the Code defines the creation, alteration or elimination of substantive rights but the Bankruptcy Rules define the process by which these privileges may be effected" (*In re Hanover Indus. Mach. Co.*, 61 B.R. 551, 552 (Bankr. E.D. Pa. 1986)). So Rule 9024 cannot validly provide Branchburg with a substantive remedy that would be foreclosed by Section 1330(a).

Branchburg tries to avoid that problem by interpreting Section 1330(a) so that it complements, rather than conflicts with, Rule 9024. Branchburg contends that Rule 9024 (via Rule 60(b)) sets out all of the potential grounds for revoking Chapter 13 confirmation orders and that Section 1330(a) simply shortens the deadline for challenging confirmation orders to 180 days for fraud alone (Rule 60(b) allows parties one year to file motions for relief based on mistake, inadvertence, excusable neglect or fraud). And Branchburg attempts to support that interpretation by pointing to the text of Rule 9024:[4]

> Rule 60 F.R. Civ. P. applies to cases under the code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

Branchburg obviously prefers to ignore just how strongly counterintuitive — indeed, logically absurd — its position really is. It posits a scenario in which the drafters of Rule 9024 came onto a scene already occupied by a congressional 180-day limitation on the ability of the victims of fraud to be relieved

4. Sections 1144 and 1230(a) are companion statutes to Section 1330(a), with the first of those addressing revocation of Chapter 11 confirmation orders and the second dealing with revocation of Chapter 12 confirmation orders.

of the consequences of that fraud,[5] and saying something along these lines:

> We recognize that Congress has provided a remedy for the victims of fraud. But we also believe that others, though perhaps less deserving (people who wish to be relieved from an order of confirmation that was entered in consequence of their own negligence or mistake), are also entitled to solicitude. So even though Congress has chosen to say nothing about people in that latter category (as it could easily have done by simply omitting the language "if such order was procured by fraud" from its Section 1330(a) statute dealing with judicial relief via revocation), we'll give those people exactly the same opportunity as victims of fraud to ask for such relief.

That reading has nothing to commend it, for it is the equivalent of permitting the drafters of Rule 9024(3) to deprive the final phrase of Section 1330(a) of any substantive effect — something that Congress did not choose to do and that neither such drafters nor we judicial readers of congressional legislation are authorized to do. By contrast, if Section 1330(a) is read as stating that an order confirming a plan cannot be revoked except upon a showing of fraud, a complaint to revoke a confirmed plan may still be filed under Rule 60 (as contemplated in Rule 9024(3)) because fraud is one of the bases for relief under that

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5. Not even Branchburg has suggested that the use of "may" in Section 1330(a) is permissive in the sense that a fraud victim "may" seek relief within 180 days, and "may" also seek relief more than 180 days, after entry of a confirmation order. Any such reading would plainly render the statute totally meaningless — accomplishing nothing at all.

rule.[6] Thus our decision today gives effect to both Section 1330(a) (which would of course trump anyway in the event of a conflict between that statute and a rule) and Rule 9024(3).

Heedless of the illogic of its contention, Branchburg would have it that Rule 9024 leaves undisturbed the Section 1330(a) time limit for seeking revocation on fraud grounds, but that the Rule does not treat the statute as having limited the grounds for relief. To that end Branchburg stresses Rule 9024's use of "time allowed" as somehow demonstrating that Section 1330(a)'s sole function is to specify an abbreviated time period for challenging confirmation orders because the challenger was defrauded. As a necessary corollary to that conclusion, Branchburg would have it that the phrase "if such order was procured by fraud" in Section 1330(a) is simply permissive rather than exclusive in nature.[7] In other words, according to Branchburg Section 1330(a) does not inhibit a court's ability to revoke a confirmation order due to a party's mistake or excusable neglect (for example) — rather the statute merely reinforces that fraud is one of the acceptable reasons to revoke a confirmation order.

Even apart from Branchburg's having glossed over the already-discussed unacceptability of its view that rulemakers

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6. In addition, although Rule 60(b) cannot be used as a vehicle for revoking such orders for reasons other than fraud, it may still be used to correct some other problems that arise with such orders. So, for example, courts could still redress clerical mistakes via Rule 60(b) without fear of violating Section 1330(a) (cf. 8 *Collier on Bankruptcy* ("*Collier*") ¶1144.07[l] (Lawrence W. King ed. in chief, 15th revised ed. 1997)).

7. Here Branchburg must argue the statute's nonexclusivity in the subject-matter sense explained next in the text, not in the obviously impermissible temporal sense that has been scotched here in n.5.

can essentially override or eliminate distinctions that Congress has chosen to include in its enactments, Branchburg offers no reason why Congress would find it necessary to reassure courts that fraud — among all of the grounds for relief enumerated in Rule 60(b) — is a permissible reason to revoke a confirmation order. Surely if any confirmation of the circumstances entitling a litigant to relief were needed, actual fraud on the litigant would be the least likely candidate for such a statutory confirmation. Thus on its face the Section 1330(a) language makes far more sense as a substantive limitation than as a needless permissive reminder. It is hardly surprising, then, that further scrutiny of Branchburg's reasoning (or lack of it) exposes several other fatal flaws.

First, Branchburg's argument relies exclusively on the language of Rule 9024 to extract a strained meaning from Section 1330(a). But we have already confirmed that bankruptcy rules cannot "abridge, enlarge, or modify" the substantive rights afforded by the Bankruptcy Code. Hence Branchburg's attempt to negate the substantive impact of the restriction contained in Section 1330(a) solely on the basis of Rule 9024's language also runs afoul of separation of power principles.

Furthermore, Branchburg's reasoning collapses if applied to related parts of the Code. Rule 9024 also adverts in identical terms to "the time allowed by § 1144" for revoking Chapter 11 confirmation orders. If then Branchburg's proposed approach were valid, the Section 1144 ground for relief should be merely permissive as well. But Section 1144 could not be more explicit: It states that a court may revoke a Chapter 11 confirmation order "if and only if such order was procured by fraud." It surely cannot be said that the single Section 1144 ground for relief is merely permissive, and that correspondingly undercuts any

legitimacy of Branchburg's parallel argument as to Section 1330(a).

Because there is a difference in locution between the "if and only if" language in Section 1144 and the simple "if" usage in Sections 1330(a) and 1230(a), it is worth a few moments to explain that no intended difference in meaning flows from that distinction. Originally Section 1144 mirrored the language of Sections 1330(a) and 1230(a) by allowing revocation "if such order was procured by fraud," but in 1984 Congress amended Section 1144 to say "if and only if." That amendment was part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub.L. 98-353, Title III §515, 98 Stat. 387), which was intended primarily to cure the constitutional problems in the 1978 Bankruptcy Act identified by *Northern Pipeline v. Marathon Pipeline Co.*, 458 U.S. 50 (1982). Hence most of the Act was devoted to restoring the jurisdiction, procedure and judgeships of the bankruptcy court system, but Subtitle H, aptly named "Miscellaneous Amendments to Title 11," also contained a slew of technical changes to the Code, including the amendment to Section 1144 (Pub.L. 98-353, Title III §515, 98 Stat. 387).

Nothing in the sparse legislative history suggests, nor is there any logical reason to believe, that the 1984 amendment sought to alter Section 1144 to give it a meaning different from the meaning of Sections 1330(a) and 1230(a). Quite to the contrary, there would be no rational purpose for Congress to prescribe a different standard for the revocation of Chapter 11 confirmation orders than for those under Chapters 12 or 13. Why should the ability or inability of a creditor to revoke a confirmation order due to mistake or inadvertence depend on the debtor's status as an individual, a farmer or a corporation?

Reading the 1984 amendment as simply clarifying the original intent of Congress, on the other hand, preserves the uniformity between the three sections. That approach has consistently been taken by commentators and courts that have had occasion to compare the amended version of Section 1144 with Sections 1230(a) and 1330(a). Thus 8 *Collier* ¶1144.02 n. 1 refers to the "minor textual difference" between the three statutes and says that the difference "is not substantive and the standards for revocation should be the same under all three chapters." And see *In re Hicks*, 79 B.R. 45, 47 (Bankr. N.D. Ala. 1987) and *In re Edwards*, 67 B.R. 1008, 1009 (Bankr. D. Conn. 1986), agreeing that Section 1144 and Section 1330 are "essentially identical."

That treatment also comports with the context and background of the 1984 Act. Subtitle H's name, organization and content provide no support for the idea that Congress sought to make any kind of systemic overhaul of the relationship between Chapter 11 and Chapter 13. On the contrary, Subtitle H's veritable kaleidoscope of minor amendments on a wide array of subjects creates a strong sense that Congress was merely tinkering with the language of the Code to clarify its original meaning.

Though the absence of any legislative history precludes a definitive determination on that score, a bit of detective work has suggested a possible explanation. It seems entirely plausible that such a change found its way to someone's checklist at the time the miscellaneous package of amendments that ended up in the 1984 legislation was being put together because a bankruptcy court opinion had treated fraud as a nonexclusive basis for revoking Chapter 11 confirmation orders. *Solon Automated Servs., Inc. v. Georgetown of Kettering, Ltd.*, 22

B.R. 312, 317 (Bankr. S.D. Ohio 1982), which was issued during the gestation period that produced the miscellaneous 1984 amendments (a period that began in 1982), had suggested that "compelling circumstances," such as when a creditor with a sufficiently large claim to affect the outcome of the confirmation process failed to receive notice, could also constitute grounds for revoking a Chapter 11 confirmed plan. There were no comparable decisions in the Chapter 12 or Chapter 13 contexts, and it is entirely understandable that the sprawling set of 1984 amendments did not create a seamless web by including conforming changes in Sections 1230(a) and 1330(a). There is no warrant for drawing a negative inference from the difference in statutory language.

Enough then for logic — we turn to precedent. Not surprisingly, Branchburg's argument also runs counter to the strong current of the case law. Thus our *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989) decision has treated fraud as the only predicate that could justify revoking a confirmation order under Section 1330. *Szostek*, *id.* at 1413 refused to revoke a Chapter 13 confirmation order even though a creditor alleged that the confirmed plan violated the substantive requirements of Section 1325:

> We conclude that once the [debtor's] plan was confirmed, it became final under § 1327 and, absent a showing of fraud under § 1330(a), it could not be challenged under § 1325(a)(5)(B)(ii) for failure to pay [the creditor] the present value of its claim.

That same reading has commended itself to the Eleventh Circuit as so clearly correct that *In re Hochman*, 853 F.2d 1547 (11th Cir. 1988) simply affirmed per curiam the reasoning of

the district court that had so held, sub nom. *United States v. Lee*, 89 B.R. 250 (N.D. Ga. 1987). And cf. *In re Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990), relying for parallel Section 1330(a) purposes on *In re Longardner & Assocs., Inc.*, 855 F.2d 455, 461 (7th Cir. 1988) and its statement that "section 1144 requires a showing of fraud." Even though succinct, *Pence's* reference to Section 1330(a) as "listing fraud as the only basis for revocation of confirmation" surely further confirms that as the commonsense reading of the statutory language.

Finally, it is not only bankruptcy courts in this Circuit (which are of course bound to follow *Szostek*) that have agreed that Section 1330(a) establishes fraud as the only permitted ground for obtaining relief from an order of confirmation. District and bankruptcy courts from numerous other Circuits have also echoed that view (examples, listed in order of the Circuits where the lower courts are located, are *In re Klus*, 173 B.R. 51, 57 (Bankr. D. Conn. 1994); *In re Walker*, 114 B.R. 847, 851 (Bankr. N.D. N.Y. 1990); *In re Woods*, 130 B.R. 204, 205 (W.D. Va. 19901; *In re Scott*, 77 B.R. 636, 637 (Bankr. N.D. Ohio 1987); *In re Young*, 132 B.R. 395, 397 (S.D. Ind. 1990); *In re Trembath*, 205 B.R. 909, 915 (Bankr. N.D. Ill. 1997); *In re Puckett*, 193 B.R. 842, 845-46 (Bankr. N.D. Ill. 1996); *In re Hood*, 211 B.R. 334, 335 (Bankr. W.D. Ark. 1997); *United States v. Edmonston*, 99 B.R. 995, 997 (E.D. Cal. 1989); *In re Hoppel*, 203 B.R. 730, 732 (Bankr. D. Mont. 1997); *In re Duke*, 153 B.R. 913, 919 (Bankr. N.D. Ala. 1993)).[8]

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8. Branchburg cites two cases as purported support for the notion that Rule 60(b) and Rule 9024 empower courts to revoke confirmation orders on grounds other than fraud, but neither case does the job for Branchburg. While *In re Burgess*, 138 B.R. 56 (Bankr. W.D. Wis. 1991) did rely on Rule 60(b) to revoke a Chapter 13 confirmation order, it is an extraordinarily weak reed on which to lean — the court did not even (Cont'd)

Appendix A

Over and above the plain thrust of the statutory language, we conclude that Congress intended that reading of Section 1330(a) because it protects the finality of Chapter 13 confirmation orders. As we have previously recognized, Congress established finality as an important goal of bankruptcy law. On that score *Szostek*, *id.* at 1409 repeated the language of *In re Penn Central Transp. Co.*, 771 F.2d 762, 767 (3rd Cir. 1985) that:

> the purpose of bankruptcy law and the provisions of reorganization could not be realized if the discharge of debtors were not complete and absolute; that if courts should relax provisions of the law and facilitate the assertion of old claims against discharged and reorganized debtors, the policy of the law would be defeated; that creditors would not participate in reorganization if they could not feel that the plan was final, and that it would be unjust and unfair to those who had accepted and acted upon a reorganization plan if the court were thereafter to reopen the plan and change the

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(Cont'd)
mention Section 1330(a), let alone attempt to explain why its express limitation should not apply. Indeed, the substantive ground for revocation relied on in *Burgess*, *id.* at 59 was directly at odds with our decision in *Szostek*. Branchburg's second proffer, *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 872 n. 15 (5th Cir. 1984), is inapposite because the appellants explicitly acknowledged that they were not trying to revoke the confirmation order at issue. Thus, while *Southmark*, *id.* at 872-77 did discuss at some length (and ultimately rejected on the merits) a challenge on equitable grounds to the res judicata effect of a confirmation order, the court had no occasion to address whether those equitable grounds (if they had instead been found valid) might have served as a basis to revoke the order.

> conditions which constituted the basis of its earlier acceptance.

Those considerations, in concert with the dictates of Section 1327,[9] have led courts to impose sharp limits on efforts to attack Chapter 13 confirmation orders (see our ruling in *Szostek*, *id.* at 1408-13 that the protection of the finality of Chapter 13 confirmation orders was more important than the obligation of the bankruptcy court and the trustee to ensure that a plan complied with the Code).

Szostek's policy rationale applies with equal force issue before us. Revoking a confirmation order is a measure that upsets the legitimate expectations of both debt creditors.[10] Interpreting Section 1330(a) as a limiting provision permits such disruption in only a very narrow category of egregious cases. Branchburg's approach, on the other hand, would open the courtroom doors to a large number of post-confirmation attacks. Those added challenges could seriously undermine the integrity of the Chapter 13 proceedings, as dissatisfied creditors

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9. Section 1327(a) states:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan.

10. Congress' reluctance to undermine the finality of Chapter 13 confirmation orders is further evidenced by the fact that Section 1330(a) permits, but does not require, courts to revoke confirmation orders procured by fraud. Thus, for example, a court might uphold such an order if the debtor had not been responsible for the fraud and if it would be either unnecessary or inequitable to dismiss or convert the case (see 8 *Collier* ¶1330.01).

could seek to drag out the litigation by bringing themselves under Rule 60(b)'s broader rubric in an attempt to extract concessions.

In sum, Branchburg's argument that Section 1330(a)'s terms are merely permissive is both logically and structurally flawed and unsupported by either case law or public policy. Branchburg has provided no persuasive reason for ignoring the plain meaning of the text of Section 1330(a).

We adhere to all the relevant considerations — plain meaning, logic, case law and the policies underlying the Code — to hold that fraud is the only ground for relief available for revocation of a Chapter 13 confirmation order. And as Branchburg admittedly does not assert that Fesq's confirmation order was procured by fraud (only a blunder in the office of Branchburg's lawyer is offered as an excuse), we will look no further into its allegations and will hence affirm the judgment below.

Conclusion

Branchburg's motion to revoke fails to allege a ground for relief recognized by Section 1330(a). We must therefore uphold the district court's judgment affirming the bankruptcy court's denial of Branchburg's motion. We too AFFIRM.

Appendix A

STAPLETON, *Circuit Judge*, dissenting:

The parties, the court, and the public have a compelling interest in the finality of a judgment. *See, e.g., Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988); *Fox v. United States Dep't of Hous. & Human Dev.*, 680 F.2d 315, 322 (3d Cir. 1982). For that reason, a judgment should never be overturned without a showing of a more compelling countervailing interest. Nevertheless, mistakes are made, and justice miscarries. Accordingly, every jurisdiction of which I am aware makes some provision for relief from a judgment. In the federal system generally, the rule is found in Fed. R. Civ. P. 60. In bankruptcy, the rule is found in Fed. R. Bankr. P. 9024, which expressly applies to "an order confirming a plan" as well as to other forms of judgment entered by a bankruptcy court.

Rule 60(b) provides that "the court may relieve a party . . . from a final judgment [because of, *inter alia*] mistake, inadvertence, surprise, or excusable neglect" so long as application is made in accordance with a stipulated time schedule. Rule 9024 provides:

> Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed

only within the time allowed by § 1144, § 1230, or § 1330.

Rule 9024 thus incorporates the grounds of relief provided in Rule 60 and then provides a different time schedule with respect to three separate categories of orders. The time limit for application for relief from an order confirming a plan of reorganization is the 180 days specified in the three cited statutory sections.

The court today finds that Congress intended to single out one particular type of judgment — a confirmation order — for special treatment and to sharply limit the availability of relief from such a judgment to a single ground — fraud. It finds this intent in a single statutory provision that appears to me to reflect nothing more than an intent to provide a limitations period for applications for relief from a confirmation order on grounds of fraud. Section 1330(a) of the Code says no more than that "the court may revoke [a confirmation] order . . . procured by fraud" if "request[ed by] a party in interest at any time within 180 days after the date of the entry of [the] order." As I read it, and as the drafters of Rule 9024 must have read it, section 1330(a) says nothing about limiting the grounds on which relief from a confirmation order may be granted. The same may be said for the legislative history of that section.[11]

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11. If any confirmation were needed of the Congressional intent, evidenced by a literal reading of section 1330(a), I believe it came with the passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984. Prior to that Act, each of the sections of the Code dealing with revocation of orders confining reorganization plans originally contained the clause "if such order was procured by fraud." In the Act, however, Congress singled out one of those sections — section 1144 — for amendment and explicitly limited the court's power to revoke

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Appendix A

Rule 9024 supplements the non-restrictive provisions of section 1330(a), but as a concession to the strong policy of finality, it preserves the time limits imposed by that section. It is not so logically absurd to conclude that the drafters of Rule 9024 thought it prudent to recognize the bankruptcy court's power to consider other compelling bases for revoking a plan confirmation order, and the Rule clearly limits the time for filing such challenges to the same period as that originally imposed by Congress in section 1330(a).

The court logically observes that any court would know that it had the power to revoke a confirmation order procured by fraud without statutory confirmation, and that section 1330(a) must therefore be read as a substantive limitation on the available grounds for relief. But the function of section 1330 is not to reassure courts that they have the power to revoke confirmation plans for fraud. Rather, its function is to provide a check by Congress on a court's natural inclination to entertain charges of actual fraud at any time — such challenges may

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confirmation orders in Chapter 11 proceedings "*if and only if* such order was procured by fraud." (emphasis added). The fact that Congress chose not to insert a conforming amendment in sections 1330(a) and 1230(a) strongly suggests that the Congressional intent to restrict the grounds for revoking confirmation orders was confined to section 1144. This makes untenable in my view the negative inferences drawn by the court from the text of section 1330(a). If, as the court suggests, Congress amended section 1144 solely to clarify the original intent of the language previously found in all three sections, I would have expected it to have clarified all three. Rather than assume an inadvertent slip on its part, I deem it more prudent to take Congress at its word. There are any number of reasons why Congress may have regarded it advisable to provide somewhat greater finality for confirmation orders in corporate reorganizations than for confirmation orders in other types of reorganizations.

only be brought within 180 days. This time limitation is the essence of section 1330(a), and Rule 9024 incorporates this essential element. Section 1330(a) contains no restriction on the court's ability to consider any number of bases for revisiting a confirmed plan, and Rule 9024 incorporates the only true restriction in that section. Rule 9024 in no way runs afoul of section 1330(a).

Nor is Branchburg's argument inconsistent with existing precedent. While our opinion in *In re Szostek*, 886 F.2d 1405 (3d Cir. 1989), contains some broad statements about the concerns of finality in confirmed bankruptcy plans, those statements must be understood in the context of the case to which that opinion is addressed. In July 1987, Fred and Denise Szostek filed a Chapter 13 bankruptcy petition. One of the Szosteks' creditors, the Kissell Company ("Kissell"), filed a proof of its secured claim, and the Szosteks objected to the amount of the claim. A hearing on the objection was scheduled for the same day as the hearing on confirmation of the Szosteks' Chapter 13 plan, but Kissell and the Szosteks agreed to a continuance of the hearing on the objection. Consequently, mistakenly thinking that the Szosteks had also agreed to postpone the confirmation hearing as well, Kissell failed to appear at the confirmation hearing, and the plan was confirmed without objection.

Three days later, Kissell filed an objection to the plan on the basis that it did not provide for present value on Kissell's secured claim.[12] Kissell eventually learned that the plan had been confirmed in its absence and without considering its

12. Present value is the amount of the secured claim repaid with interest to account for the time value of money. The Szosteks' plan provided only for payment of the face value of Kissell's claim.

objection. It therefore sought revocation of confirmation under 11 U.S.C. § 1330. Kissell contended that the Szosteks had obtained confirmation of their plan through fraud, and that the plan should never have been confirmed because it failed to conform to the Code's requirement of present value payment on Kissell's' secured claim.

The bankruptcy court found no evidence of fraud, so it denied revocation of the plan under 11 U.S.C. § 1330. The district court reversed. Although it found no fraud, it ruled that the bankruptcy court and the trustee had failed to fulfill their independent obligations to ensure that the plan complied with 11 U.S.C. § 1325(a)(5), which requires payment of present value on secured claims.

We reinstated the bankruptcy court's order because 1) the bankruptcy court's failure to apply section 1325(a)(5) to the plan was not grounds for revoking a confirmed plan in the absence of timely objection by the creditor, and 2) after confirmation of a plan, the policy of finality of bankruptcy plans overrides the court's and the trustee's responsibility to ensure that plans conform to section 1325(a)(5) of the Bankruptcy Code.

Our ultimate — and quite narrow — conclusion in *Szostek* was simply that "once the Szosteks' plan was confirmed, it became final under § 1327 and, absent a showing of fraud under § 1330(a), it could not be challenged under § 1325(a)(5)(B)(ii) for failure to pay Kissell the present value of its claim." 886 F.2d at 1413. Our holding in *Szostek* in no way restricted the grounds for revoking confirmation of a plan to fraud. We simply rejected the argument advanced by Kissell — that failure to comply with section 1325(a)(5)(b)(ii) could serve as one of

those grounds. Kissell never attempted to rely on Rules 9024 and 60(b) to revoke confirmation of the plan on the basis of mistake or excusable neglect, and we were consequently not called upon to evaluate such an argument in *Szostek*.

The reasoning underlying *Szostek* is not applicable in this case. The creditor in *Szostek* sought to excuse its failure to object by relying on a legal argument that it neglected to make at the confirmation hearing. In such a situation, the policy of finality and constructive assent should apply to foreclose the creditor from returning to present an argument that should have been presented at another time. Branchburg's argument, however, is not that the plan should be revoked because Branchburg has a meritorious challenge, but because it was *prevented* from presenting that challenge before for a reason that is recognized in the procedural rules as a valid basis for revocation. Branchburg's absence should not be viewed as constructive assent because it might be excused and remedied pursuant to statutory authority. *Szostek* does not control our decision in this case.[13]

The majority also points to a number of bankruptcy and district court decisions in support of its reading of section 1330(a). I find more persuasive the approach taken by the Ninth Circuit in an opinion addressing a section analogous to section 1330(a) that strongly suggests its disagreement with the premise of these other courts. In *In re Cisneros*, 994 F.2d 1462 (9th Cir. 1993), the trustee never received notice that the IRS had filed

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13. The same can be said for the limited statements on the scope of section 1330(a) in *United States v. Lee*, 89 B.R. 250, 256 (N.D. Ga. 1987); and *In re Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990). Neither of these cases considered the issue presented in this case, and the reasoning of these cases does not constrain our analysis here.

a proof of claim, so the debtor's Chapter 13 plan was confirmed and a full discharge entered after payment in full to all creditors but the IRS. After it discovered the mistake, the IRS moved to reopen the case. The bankruptcy court sua sponte raised the issue of whether it could vacate the discharge on the basis of Fed. R. Civ. P. 60(b), and it concluded that it could in fact grant the government's motion on that basis.

On appeal, the debtor argued that the court lacked the power to vacate the discharge order in light of section 1328(e), which provides as follows:

> On request of a party in interest before one year after discharge under this section is granted, and after notice and a hearing, the court may revoke such discharge only if —
>
> (1) such discharge was obtained by the debtor through fraud; and
>
> (2) the requesting party did not know of such fraud until after such discharge was granted.[14]

The debtors argued that, to the extent that section 9024 provided any grounds other than fraud for revoking a discharge, it conflicted with section 1328(e) and was thus invalid.

Although the Ninth Circuit agreed that the statute would have to take precedence in the event of a conflict, it found that no conflict existed and that the bankruptcy court could properly

14. This statute is thus apparently even more restrictive that section 1330(a); therefore, the Ninth Circuit's reasoning applies *a fortiori* to this case.

revoke the discharge pursuant to Rule 60(b), as incorporated by Rule 9024.[15] *Id.* at 1466. While *Cisneros* is also not directly applicable here, it concluded that Rules 60(b) and 9024 apply under a clearly analogous set of circumstances.

Based on the text and legislative history, I am convinced that Congress did not intend to give confirmation orders special treatment by making them impervious to challenge save on grounds of fraud. Even if I perceived some ambiguity and were less than convinced about this proposition, however, I would decline to reach the conclusion reached by the court today. Why should we, in the absence of an unambiguous directive of Congress, tie the hands of bankruptcy judges in situations where justice cries out for review of a previously entered judgment. Why, for example, should we render a bankruptcy court powerless to grant relief when an objecting creditor's attorney has a heart attack on his way to a confirmation hearing at which a final order is entered? Moreover, not only would such a holding fail to serve justice, little, if anything, would be gained from it in the way of finality. Under the court's reading of the Code and the Rules, litigants cannot count on the finality of a confirmation order until 180 days after the order is entered. Up

15. The court also revealed that the bankruptcy court in this case wrongly relied on the holding of *In re Gregory*, 705 F.2d 1118 (9th Cir. 1983), in support of its conclusion that confirmed plans may only be revoked for fraud. The *Cisneros* court pointed out that it held in *Gregory* only that a creditor who had not objected at the confirmation hearing could not mount "a collateral attack" on a plan after it became final. 994 F.2d at 1466-67. But it emphasized that "[w]e had no occasion to consider whether the bankruptcy court had confirmed the plan under the influence of a mistaken view of the facts, and, if so, whether this mistake could have been corrected under Rule 60(b) and Bankruptcy Rule 9024. Gregory is inapposite, and thus unhelpful to the Debtors here." *Id.* at 1467.

until that time, a claim of fraud can be asserted and litigated. While my reading of the Code and Rules would permit claims of a limited variety, other than fraud, to be filed during that period, it would not extend the date upon which a confirmation order becomes unchallengeable.

I respectfully dissent. I would reverse and remand to allow the bankruptcy court to consider Branchburg's request to reopen the plan. I would intimate no opinion on the merits of Branchburg's claim because I believe the bankruptcy court is best situated to make that decision.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 6, 1997

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 96-5555 (GEB)

In re:
WILLIAM FESQ,

Debtor,

BRANCHBURG PLAZA ASSOCIATES,

Appellant,

v.

WILLIAM FESQ,

Appellee.

MEMORANDUM OPINION

BROWN, District Judge

This matter comes before the Court on the appeal of Branchburg Plaza Associates, L.P. ("Branchburg" or "Appellant") of the Bankruptcy Court's October 28, 1996 Order ("October 28th Order"), wherein the Bankruptcy Court granted the motion of debtor William Fesq (the "Debtor" or "Appellee") to discharge Branchburg's lien and denied Branchburg's cross-motion to vacate the confirmation order based upon Bankruptcy Rule 9024. For the reasons set forth in this

Appendix B

Memorandum Opinion, issued without oral argument pursuant to FED. R. CIV. P. 78, this Court will affirm the Bankruptcy Court's Order in its entirety.

I. BACKGROUND

On April 16, 1993, Branchburg recovered a judgment against the Debtor in the Superior Court of New Jersey, Law Division, in the amount of $69,166.59 (the "Judgment"). To enforce the Judgment, a writ of execution was issued on December 17, 1993 against the Debtor's residence at 538 Cokebury Road, Califon, New Jersey (the "Property"). Subsequently, on or about July 14, 1995, the Debtor filed a Chapter 7 bankruptcy petition (the "Chapter 7 case"). *In re Fesq*, Bankr. No. 95-34978 (Bankr. D.N.J.) (KCF). The Debtor listed the Property, which was owned by the Debtor and his wife as tenants by the entirety, as an asset in his petition.

The Chapter 7 case was subsequently closed by the Trustee, and Branchburg sought to foreclose upon its lien against the Property. The Bankruptcy Court held a hearing on March 4, 1996, during which time the Debtor's counsel stated that if the Debtor did not prevail, he would then file a Chapter 13 proceeding. *See* Transcript of March 4, 1996 Hearing at 7-8, 11. At the conclusion of the hearing, the Bankruptcy Court determined that Branchburg's lien survived the Chapter 7 case, that the costs of sale or transfer may not be deducted in determining the amount of the Branchburg lien, and that the issue of the valuation of the Property would have to be resolved in a Chapter 13 proceeding, if and when a Chapter 13 petition was filed. *See id.* at 11-12.

On March, 1996, the Debtor did in fact file a Chapter 13 petition (the "Chapter 13 case"). *In re Fesq*, Bankr. No.

96-31679 (Bankr. D.N.J.) (KCF). Despite being aware of the filing, Branchburg took no action (other than filing a Notice of Appearance) to protect their rights. Indeed, they failed either to attend the Section 341(a) hearing or to schedule a Rule 2004 examination of the Debtor. Branchburg also failed to timely file any objection to the Debtor's Chapter 13 plan. At the confirmation hearing held on August 15, 1996, the debtor's plan was confirmed.

Immediately upon entry of the Order of Confirmation, the Debtor filed a motion to vacate Branchburg's lien on the Property. On August 30, 1996, Branchburg filed a cross-motion to vacate the Order of Confirmation, alleging that the failure to timely object was due to a scheduling error by Branchburg's counsel. The Bankruptcy Court granted the Debtor's motion and denied Branchburg's cross-motion. Subsequently, on October 30, 1996, Branchburg filed its Notice of Appeal.

II. DISCUSSION

A. Standard of Review

Bankruptcy Rule 8013 provides in pertinent part: "On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact will be upheld unless clearly erroneous." 11 U.S.C.A. Rule 8013 (West Supp. 1995); *Resyn Corp. v. United States*, 851 F.2d 660, 664 (3d Cir. 1988). In defining the term "clearly erroneous" the United States Supreme Court has stated that "[a] finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conclusion that a mistake has been

committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 365 (1948). A bankruptcy court's conclusions of law are subject to plenary review. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir. 1988). Where mixed questions of law and fact are presented, the appropriate standard must be applied to each component. *In re Sharon Steel Corp.*, 871 F.2d 1217, 1222 (3d Cir. 1989).

B. Revocation of Confirmation

It is well settled that a court may not revoke the confirmation of a Chapter 13 plan under 11 U.S.C. § 1330 unless the confirmation was procured by fraud.[1] *See, e.g., In re Szostek*, 886 F.2d 1405, 1413 (3d Cir. 1989); *In re Wolf*, 162 B.R. 98, 103 (Bankr. D.N.J. 1993) (citing *In re Szostek*, 886 F.2d at 1413); *In re Moseley*, 74 B.R. 791, 803 (Bankr. C.D. Cal. 1987) (footnote omitted). To support an application for revocation, the movant must prove each of the elements of a traditional cause of action for deceit: (1) that the debtor made a representation regarding her compliance with 11 U.S.C. § 1325 which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court

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1. Section 1330(a) provides as follows:

> On request of a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

11 U.S.C. § 1330(a).

to rely upon it; (4) the court did rely upon it; and (5) that as a consequence of such reliance, the court entered the confirmation order. *See In re Moseley*, 74 B.R. at 803 (citation omitted).

In the present matter, Appellant does not allege that the confirmation order was procured by fraud. Instead, Appellant contends that, despite that plain language of Section 1330 and the equally clear precedent in this circuit, the Bankruptcy Court erred by failing to consider whether the Debtor's confirmation order should be vacated due to Appellant's mistake, inadvertence or excusable neglect.[2] Appellant bases this conclusion on Bankruptcy Rule 9024, which Appellant contends preempts Section 1330 in large part because it only refers to Section 1330 as a time limitation on Rule 60(b) of the Federal Rules of Civil Procedure.[3] *See* Appellant's Brief at 6. As a result, according to Appellant, the grounds for relief set forth in Rule 60(b) (*i.e.*, mistake, inadvertence, or excusable neglect) remain viable when a party seeks to revoke an order confirming a Chapter 13 plan. *Id.*

Appellant's argument must fail for at least two reasons. First, as noted above, the Third Circuit has already determined

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2. The "mistake" in this case, according to Appellant, concerns a "computer glitch" that caused Appellant to mistakenly believe that October 5, 1996, rather than August 5, 1996, was the last day to submit objections to confirmation of the Debtor's plan. See Appellant's Brief at 3. As a result of this alleged mistake, Appellant asserts that it was unable to establish that its claim was $78,000.00, instead of the $7,050.00 provided for in the Debtor's plan. *Id.* at 4.

3. Bankruptcy Rule 9024 provides, in relevant part, that Rule 60(b) of the Federal Rules of Civil Procedure "applies to cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by . . . Section 1330." BANKR. R. 9024.

that an order of confirmation may only be challenged if it was procured through fraud. *See, e.g., In re Szostek*, 886 F.2d at 1413; *see also In re Wolf*, 162 B.R. at 103 (citing *In re Szostek*, 886 F.2d at 1413). Second, it is clear that Section 1330 preempts Rule 60(b) of the Federal Rules of Civil Procedure. *In re Moseley*, 74 B.R. at 803 n.20. Therefore, the Bankruptcy Court did not err by failing to consider whether the confirmation plan was procured by mistake, inadvertence, or excusable neglect, and Appellant's argument must fail.[4] Accordingly, this Court will affirm the Bankruptcy Court's October 28, 1996 Order in its entirety.

III. CONCLUSION

For the foregoing reasons, the Court will affirm the Bankruptcy Court's October 28, 1996 Order in its entirety. An appropriate Order is filed herewith.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

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4. Appellant's suggestion that the confirmation order should be vacated "in the interests of justice" or because it allegedly has a "meritorious defense," *see* Appellant's Brief at 8, must fail for the same reason.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 96-5555 (GEB)

In re:
WILLIAM FESQ,

Debtor,

BRANCHBURG PLAZA ASSOCIATES,

Appellant,

v.

WILLIAM FESQ,

Appellee.

For the reasons set forth in this Court's Memorandum Opinion, issued without oral argument pursuant to FED. R. CIV. P. 78,

IT IS this 6th day of March, 1997

ORDERED that the Bankruptcy Court's October 28, 1996 Order be and is hereby AFFIRMED in its ENTIRETY.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY DETERMINING SECURED LIEN TO BE FULLY SATISFIED AND DIRECTING SAME TO BE CANCELLED OF RECORD FILED OCTOBER 25, 1996

COHN BRACAGLIA
A Professional Corporation
Counsellors at Law
362 East Main Street
P.O. Box 1094
Somerville, New Jersey 08876
(908) 526-1131
John F. Bracaglia, Jr., Esq.
Attorney for Debtor
JB – 1479

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Chapter 13

Case No. 96-31679

In re:
WILLIAM FESQ,

Debtor.

ORDER DETERMINING SECURED LIEN TO BE FULLY SATISFIED AND DIRECTING SAME TO BE CANCELLED OF RECORD

The within matter having come before the Court upon the motion of Cohn Bracaglia, P.C., attorneys for debtor, for an

Appendix C

Order determining a certain secured lien to have been satisfied and discharged of record; and it appearing that due notice has been given; and the Court having reviewed the moving papers; and good cause being shown,

It is on this 25th day of October 1996

ORDERED that the lien of Branchburg Plaza Associates, L.P. against the debtor's real property at 538 Cokesbury Road, Califon, New Jersey, which lien resulted from a certain judgment entered in the Superior Court of New Jersey, in the case entitled *Branchburg Plaza Associates, L.P. vs. William McBride Associates, Inc. and William Fesq, Individually*, Docket No. SOM-L-1746-90 and J-50548-93, be and is hereby deemed to be fully satisfied and shall be cancelled and discharged of record as a lien against the debtor's real property at 538 Cokesbury Road, Califon, New Jersey.

s/ Kathryn C. Ferguson
HONORABLE KATHRYN C. FERGUSON

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY DENYING CROSS-MOTION OR APPLICATION FOR THE ENTRY OF AN ORDER TO VACATE ORDER FOR CONFIRMATION AND DENY MOTION TO DECLARE LIEN SATISFIED FILED OCTOBER 28, 1996

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 96-31679
Chapter: 13
Hearing Date: 10-24-96

In re:
William M. Fesq

Debtor(s).

ORDER DENYING CROSS-MOTION OR APPLICATION FOR THE ENTRY OF AN ORDER TO VACATE ORDER FOR CONFIRMATION AND DENY MOTION TO DECLARE LIEN SATISFIED

A motion or application having been filed on September 3, 1996 by E. Berger, Esq., for Branchburg Plaza Associates, for entry of an order as set forth above, all interested parties having been duly served, the Court having considered all of the papers submitted, along with any arguments of counsel, and for good cause shown,

It is on this October 28, 1996

ORDERED that the aforesaid motion or application is denied.

Appendix D

The successful party shall serve this order on the debtor, any trustee and all parties who entered an appearance on this matter.

s/ Kathryn C. Ferguson
Honorable Kathryn C. Ferguson
United States Bankruptcy Judge

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on October 28, 1996, I mailed a copy of the foregoing order to each of the following: Attorney for Debtor.

James J. Waldron
Clerk

BY: s/ F. Beres
Fran Beres
Deputy Clerk

APPENDIX E — EXCERPTS FROM TRANSCRIPT OF MOTION HEARING DATED OCTOBER 24, 1996

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 96-31679

Trenton, New Jersey
October 24, 1996

IN RE:

WILLIAM FESQ,

Debtor.

MOTION
BEFORE THE HONORABLE KATHRYN C. FERGUSON
UNITED STATES BANKRUPTCY JUDGE

* * *

[8] * * *

THE COURT: Okay, I think I've heard enough. Thank you.

Let's start with the cross motion to vacate the Confirmation Order. The applicable law cited by both parties is Federal Rule of Civil Procedure 60(b)(1) made applicable to bankruptcy proceedings by Bankruptcy Rule 9024. It provides that "for relief from a judgment or order, a motion upon such [9] terms as are just, the Court may relieve a party or his legal representative from a final judgment order or a proceeding for

the following reasons. One, mistake, inadvertence, surprise or excusable neglect."

Branchburg seeks a determination from this Court that its counsel's acts in misdiarying the confirmation date of the debtor falls within the meaning of excusable neglect. Branchburg provides no authority for this Court to make that determination. Branchburg cites several cases which granted relief under excusable neglect but do not define it. Furthermore, the cases cited deal with vacating a default judgment pursuant to 60(b). That's not the case here.

In the case at bar, the movant is seeking to vacate a Confirmation Order of a Chapter 13 plan approved by this Court.

The debtor responds by citing a Third Circuit case that sets certain criteria for vacating orders or judgments under Rule 60(b). The debtor encounters the same problem. The case *Gross vs. Stereo Component Systems* also deals with vacating a default judgment. Thus, the Court has not been cited to authority to determine what constitutes excusable neglect in the context of a motion to vacate a court approved Chapter 13 confirmed plan.

Instead, the Court must look to the Supreme Court's more general standard for guidance. In *Pioneer Investment* [10] *Services* at 113 Supreme Court Reporter 1489, which is also at 123 Lawyers Edition 74, the Supreme Court held that the question of excusable neglect is fundamentally an equitable determination which should depend upon consideration of five factors. One, the danger of prejudice to the debtor. Two, the length of the delay and its potential impact on judicial proceedings. Three, the reason for the delay, including whether

it was within the reasonable control of the movant. Four, whether the movant acted in good faith. And five, whether the client should be penalized for their counsel's mistake or neglect.

The asserted neglect in this instance was Branchburg's counsel's writing in an incorrect confirmation date. Applying the *Pioneer* factors, this Court must determine by the totality of the circumstances whether it is equitable to find that Branchburg's attorney's conduct can be viewed as excusable neglect. This Court believes that the movant's negligence in diarying the wrong confirmation date does not rise to the level where it would be a fundamentally equitable determination.

Furthermore, the Third Circuit has limited this Court's authority to vacate a Court's Order once a Chapter 13 plan has been confirmed by the Court, absent fraud.

For the purposes of this analysis, the most relevant factor is whether the reason for delay was beyond the [11] reasonable control of the attorney, the movant. Branchburg's counsel did not experience any unexpected or unavoidable event which caused him to write down the wrong date. Moreover, as the debtor argues, Branchburg took no other actions from March '96 until September '96. It did not attend the 341 meeting, it did not seek a 2004 examination. Although counsel asserts that he was not served with papers, Branchburg undisputedly received notice of the commencement of the case which correctly listed the date for the 341 meeting and the confirmation, but Branchburg took no action.

The Court finds that the initial mistake made by Branchburg's counsel was not excusable neglect.

Appendix E

As far as prejudice and delay, Branchburg argues that the debtor is not prejudiced because the debtor knew about Branchburg's lien, and further argues that since the Confirmation Order effectively reduces Branchburg's lien, Branchburg has a meritorious defense to the Order confirming the plan.

This argument is based on the conclusion that the Court needs further evidence to correctly determine the value of Branchburg's collateral.

Basically, Branchburg argues that if it had objected to confirmation, the Court would not have allowed the debtor to reduce its claim. The problem is Branchburg did not object to confirmation. The debtor incurred costs in confirming the [12] plan and has made payments to the trustee in reliance on that confirmed plan. As the Court stated in *In Re: Zostek* (phonetic) at 886 Fed. 2d, 1405, and I'll quote here, "We further conclude that although prior to confirmation the Bankruptcy Court and trustee do have a responsibility to verify that a Chapter 13 plan complies with the Bankruptcy Code provisions, after the plan is confirmed, the policy favoring the finality of confirmation is stronger than the Bankruptcy Court's and the trustee's obligation to verify a plan's compliance with the Code." That's the end of the quote, that's at 1405.

The *Zostek* Court concluded that in the absence of fraud by the debtor, the failure of a creditor to attend the confirmation hearing or to object timely to a plan regardless of the reason, precludes the creditor from obtaining recovery subsequently in a proceeding. You can also see *In Re: Gregory*, at 705 Fed. 2d, 1118 for that proposition.

There is no suggestion here that the debtor in any way defrauded the creditor. Consequently, whether Branchburg feels that it had a meritorious claim under Rule 60(b) carries very little weight in this Court's determination of whether there was an underlying meritorious defense. Whether there was a meritorious defense prior to confirmation, I just don't know. But the plan has been confirmed, and the debtor has fully — or is in the process of paying Branchburg's claim [13] as listed in the plan.

We all make mistakes, Mr. Berger, and I'm not happy about imposing the consequences that are going to flow here, but *Zostek* put a premium on the finality of a Confirmation Order in a Chapter 13.

Accordingly, the motion to determine the secured lien to be fully satisfied will be granted. And the cross motion to vacate the Order of Confirmation and deny the debtor's motion will be denied with the standard Order.

Thank you, counsel.

MR. ARBER: Thank you, Your Honor.

MR. BERGER: Your Honor, I would ask the Court to reconsider in light of the fact that while we did not attend the 341 hearing, we did obtain a tape of that hearing. We did not feel it was necessary to attend the hearing, but felt it sufficient to obtain the tape.

Also the reason that there was no 2004 examination was because the amount that was set forth was exactly the same

amount that was discussed at the hearing at length in March. So that a 2004 examination would have been redundant.

THE COURT: Okay, thank you. I accept those representations, but it doesn't — they don't address what I think is the primary leg of the Court's decision, which is the *Zostek* case.

MR. BERGER: I would ask for a stay so we can appeal [14] the decision prior to the vacating of the lien.

THE COURT: You can file a more formal motion for a stay pending appeal. I've got a lot of people and it's almost 4:00. Thank you.

(Matter concluded)

* * *

APPENDIX F — EXCERPTS FROM TRANSCRIPT OF MOTION HEARING DATED MARCH 4, 1996

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Case No. 95-34978

402 East State Street
Trenton, New Jersey 08608
March 4, 1996

IN THE MATTER OF:

WILLIAM M. FESQ

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KATHRYN FERGUSON
UNITED STATES BANKRUPTCY JUDGE

* * *

[11] * * *

THE COURT: Okay. Thank you. It seems to me that is the way this case is going to be resolved because — and I have trouble pronouncing it too, but the Ahbra Hemsada case at 162 B.R. 676, is quite persuasive and convinces me that when calculating equity for the purposes of lien avoidance under 522(f), the costs of sale or costs of transfer of the property are not deductible.

[12] And, *In re Johnson*, at 184 B.R. 141 stands for the proposition that the principle remains the same, even after the '94 amendment. If the costs of sale and capital gains aren't

deducted out, then the lien is unavoidable under the mathematical formula set in 522(f).

I'm reluctant to fix the amount of the lien at this point. While there is some evidence before me of the value of the property, I'm not convinced that the record is fully fleshed out enough for me to make that call.

Accordingly, I'm going to — let's see, what do we have here? We have a motion to reopen, which I'll grant for the limited purpose of hearing this motion. I also have a motion to void the writ to enjoin the sheriff sale to void judgment and hold the creditor in contempt. Counsel for the Debtor now properly concedes that this is not a stay violation, so to the extent that the motion seeks to hold the creditor in contempt, it'll be denied. In fact, the Debtor's motion will be denied, without — obviously without prejudice, to address the issue of valuation and any subsequent proceeding that may be filed. The motion to reopen will be granted for the purpose of determining this motion, the motion to void the lien will be denied and the case will be reclosed. Thank you.

MR. BRACAGLIA: Thank you.

* * *

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED SEPTEMBER 25, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-5140

IN RE: WILLIAM FESQ, Debtor
BRANCHBURG PLAZA ASSOCIATES, L.P.,
Appellant

v.

WILLIAM FESQ

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Judge*, SLOVITER, STAPLETON, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, LEWIS, McKEE and RENDELL, *Circuit Judges*, and SHADUR,* *District Judge*

The petition for rehearing filed by petitioner in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

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* Hon. Milton I. Shadur, Senior U.S. District Judge for the Northern District of Illinois, was a member of the original panel. His vote is limited to panel rehearing only.

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court

s/ [illegible]
Circuit Judge

DATED: SEP 25 1998